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No. 94-2060

Supreme Court, U.S.
FILED
JUL 17 1995
CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

ARCO PRODUCTS CO.,

Petitioner,

v.

GRAHAM OIL CO.,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. May petroleum product franchisors require that franchisees, as a condition of being permitted to renew their franchise agreements, give up substantive rights expressly granted to them by the Petroleum Marketing Practices Act?

2. Was it error to hold invalid an arbitration clause in a petroleum franchise agreement when that clause (1) established a unified procedure for handling all disputes, (2) contained three different provisions that were illegally imposed by the franchisor in contravention of the Petroleum Marketing Practices Act, and (3) contained a provision indicating an intent that the arbitration clause be treated as an integrated whole?

SUPPLEMENTAL STATEMENT AS TO PARTIES

The named parties to the proceeding in the court below are Graham Oil Company and ARCO Products Company. Respondent Graham Oil Company has no parent or subsidiary companies that require listing pursuant to Rule 29.1.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Graham Oil Co. respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by Petitioner ARCO Products Co.

SUPPLEMENTAL STATEMENT OF THE CASE

When Petitioner ARCO presented Graham, its franchisee, with a proposed agreement to renew Graham's ARCO franchise (Petition for Certiorari at 3), ARCO specifically refused to bargain over its terms, including provisions that for the first time in the history of the parties' relationship attempted to eliminate rights that are granted to franchisees by the Petroleum Marketing Practices Act ("PMPA"), 15 U.S.C. §§ 2801-2806. ARCO's transmittal letter said:

> THE PROVISIONS OF THE ATTACHED AGREEMENT ARE MUTUALLY DEPENDENT, AND THEREFORE THE ATTACHED AGREEMENT MUST BE ACCEPTED OR REJECTED AS A WHOLE. ANY FAILURE TO AGREE TO THE ATTACHED AGREEMENT WILL BE DEEMED A GROUND FOR NONRENEWAL OF ANY "FRANCHISE RELATIONSHIP" UNDER THE PETROLEUM MARKETING PRACTICES ACT.

Plaintiff's Ex. 6, p. 10. The United States Court of Appeals for the Ninth Circuit explained that its decision comports with Congressional policy:

> [T]he fact that franchisees may agree to an arbitral forum for the resolution of statutory disputes in no way suggests that they may be forced by those with dominant economic power to surrender the statutorily-mandated rights and benefits that Congress intended them to possess. . . . If franchisees could be compelled to

> surrender their statutorily-mandated protections as a condition of obtaining franchise agreements, then franchisors could use their superior bargaining power to deprive franchisees of the PMPA's protections. In effect, the franchisors could simply continue their earlier practice of presenting prospective franchisees with contracts of adhesion that deny them the rights and benefits afforded by Congress. In that way, the PMPA would quickly be nullified.

Petition for Certiorari, Appendix, at A-5.

SUMMARY OF THE ARGUMENT

The United States Court of Appeals for the Ninth Circuit held that the arbitration clause that ARCO required Graham to accept as a condition of renewing its franchise contained three different provisions purporting to deprive Graham of three different rights expressly granted franchisees by the Petroleum Marketing Practices Act. Those rights are substantive, and are important to carrying out the purposes of the Act. The Court of Appeals correctly concluded that ARCO's imposition of those terms in the arbitration clause was illegal.

Having so concluded, the Court of Appeals determined that the entire arbitration clause should be held invalid. That determination was based on the specific features of ARCO's arbitration clause and on its expressed relationship to the

remainder of the agreement, as well as on the fact that it contained multiple illegal provisions. That determination was specific to the arbitration clause involved in this case.

The general principle of contract law upon which the Court of Appeals relied was that severance of individual contract provisions for invalidation is inappropriate when the entire clause represents an "integrated scheme to contravene public policy." ARCO has not contended that principle is an incorrect statement of the law. It argues only that *in this case* the court should have invalidated the specific illegal terms and left the remainder of the arbitration provisions in place.

That is a determination that should be made on a case-by-case basis depending on the details of the particular arbitration clause and its relationship to the remainder of the contract. On the facts presented here, the decision of the United States Court of Appeals for the Ninth Circuit was correct. The case presents no issues that require review by this Court.

REASONS FOR DENYING THE WRIT

As shown below, the ruling of the United States Court of Appeals for the Ninth Circuit depends heavily on the terms of a single petroleum franchise agreement. Neither the record nor the reported decisions indicate that other petroleum franchise contracts contain such provisions. There is no conflict

among the circuits, nor does the case present any issue of constitutional dimension or any general issues of federal law that have broad application. It is a fact-specific dispute, properly resolved below, about a contract of adhesion that ran afoul of express provisions of the Petroleum Marketing Practices Act. This Court's intervention is not required.

I.

The Case Does Not Present the Questions that Petitioner Has Proposed for Review

A. This Case Is Not About Procedural Waivers Mutually Agreed to by the Parties.

Petitioner ARCO attempts, by the phrasing in its first proposed question for review, to create the impression that the parties mutually agreed to waive certain statutory procedures, and that the Court of Appeals for the Ninth Circuit has held they could not do so. That is not what happened.

First, there was nothing mutual about the so-called waiver. It was unilaterally dictated by ARCO. Petition for Certiorari, Appendix, at A-5, A-7. And see above at p. 2 and below at note 7.

Second, the arbitration clause imposed by ARCO did not simply provide substitutes for "procedural" matters under the PMPA. It required Graham to forego *substantive* rights that are specifically granted by the PMPA: the right to a one-year

period in which to assert claims against the franchisor, the right to exemplary damages under defined circumstances, and the right to recover reasonable attorney fees upon successful prosecution of certain claims.

Congress expressly granted franchisees such rights because it was aware that petroleum product franchisors typically use their disproportionate bargaining power to do what ARCO did here: impose, unilaterally, one-sided contractual terms that are unfavorable to franchisees.[1]

B. This Case Is Not About Merely Incidental Provisions in the Arbitration Clause.

ARCO's second proposed question contains the unsupported assumption that the portions of the arbitration clause that the Court of Appeals held it imposed illegally were

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[1] Central to the problems faced by franchisees in this regard is the disparity of bargaining power which exists between the franchisor and the franchisee. . . .

It is important to note that while the relationship of the parties to a motor fuel franchise agreement is basically contractual in nature, normal remedies for violations of the contractual provisions are often eschewed by the franchisor. . . .

S. Rep. No. 731, 95th Cong., 2d Sess. (1978), *reprinted in* 1978 U.S.Code Cong. & Ad. News 873, 876.

somehow merely collateral to the real arbitration provisions. Again, that is not the case.

The elimination of the one-year statutory limitation period is at the heart of the initial paragraph of ARCO's arbitration procedures; it attempts to limit the right of franchisees to assert Congressionally-authorized claims against franchisors.[2] The denial of the right to exemplary damages is an express exception to the arbitrators' authority to grant just and equitable relief on those claims.[3] The denial of the right

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[2]See Petition for Certiorari, Appendix, at A-66:

> . . . The party [demanding arbitration] waives the right to seek any relief or pursue any claim not included in an arbitration demand filed and served within 90 days following the date the party knew or should have known of the facts giving rise to the claim and in no event more than six months after the occurrence of the facts giving rise to the claim in the absence of active fraud or concealment of the facts by the opposing party.

[3]See Petition for Certiorari, Appendix, at A-69:

> . . . The panel shall have authority to issue any lawful relief that is just and equitable, except punitive damages.

to recover attorney fees is an integral part of the franchise agreement's dispute resolution clause.[4]

The Court of Appeals for the Ninth Circuit explained that all of these rights are

> . . . important to the effectuation of the PMPA's policies. The purpose of exemplary damages is to deter franchisors from engaging in improper terminations of franchise agreements. The purpose of attorney's fees is to deter franchisors from improperly contesting meritorious claims. Finally, the purpose of a one-year statute of limitations is to afford franchisees a reasonable period of time in which to seek relief for improper terminations and other abuses by petroleum franchisors. . . .

Petition for Certiorari, Appendix, at A-7.

ARCO has not challenged this summary of the importance of the statutory rights involved here. The provisions of the arbitration clause that would have eliminated those rights are not merely incidental.

In deciding to hold the entire arbitration clause invalid, the Court of Appeals stated:

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[4]See Petition for Certiorari, Appendix, at A-64:

> . . . Judgment upon the award of the arbitrator(s) may be entered and enforced in any court having jurisdiction thereof. Each party shall pay its own costs and expenses, including attorneys' fees related to such arbitration . . .

> . . . As a leading treatise notes, severance is inappropriate when the entire clause represents an "integrated scheme to contravene public policy." *See* E. Allan Farnsworth, *Farnsworth on Contracts* § 5.8, at 70 (1990). . . .

Petition for Certiorari, Appendix, at A-9. ARCO does not contend this is an incorrect rule of law; it argues only that the facts of this case call for the application of a different rule (Petition for Certiorari at 13). That is a case-specific issue, not the kind of question that requires review by this Court.

C. This Case Does Not Involve Fact-Finding at the Appellate Level.

ARCO's final proposed question for review asks whether a federal appellate court may "engage in fact-finding in the first instance." There has been no appellate level fact-finding in this case, however. The Court of Appeals for the Ninth Circuit did nothing more than use the phrase "the fact that" -- a common rhetorical device[5] -- in the course of pointing out what is readily apparent from ARCO's imposition of the arbitration clause as a required part of its franchise agreement: that

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[5]A computer search of this court's decisions produced a list of more than 5,000 cases in which that phrase, or a very similar one, occurs -- often more than once in a single opinion.

ARCO was attempting to nullify express requirements of the PMPA.[6]

II.

The Decision of the Ninth Circuit Leaves Parties Free To Agree To Arbitrate PMPA Claims on Mutually Agreeable Terms

The court below held a specific arbitration clause in a specific contract to be invalid for a very specific combination of reasons: because the terms of that clause were imposed unilaterally by one of the parties,[7] because it was a highly integrated clause that contained three different provisions that the PMPA makes it illegal to impose on a franchisee, because the arbitration clause itself specified that, as to any claims

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[6] Our decision to strike the entire clause rests in part upon the fact that the offensive provisions clearly represent an attempt by ARCO to achieve through arbitration what Congress has expressly forbidden. . . .

Petition for Certiorari, Appendix, at A-9.

[7] See Petition for Certiorari, Appendix, at A-5. The record provides ample support. Late in 1990 ARCO sent to Graham, which had been an ARCO distributor for more than 40 years, a form of agreement to "renew" Graham's ARCO franchise effective January 1, 1991. ARCO specifically refused to bargain over any terms of the renewal. See page 2, *supra*. ARCO thus required a franchisee which had operated under the ARCO brand for more than four decades to choose between giving up the relationship upon which it had built its business and signing an agreement which, for the first time in the history of that relationship, purported to preclude resort to important features of the PMPA.

under the franchise agreement, the arbitration clause in its entirety would survive the termination or expiration of the agreement, and because all of its unlawfully-imposed provisions were part of a unified procedure for handling all disputes. The Petition for Certiorari does not attempt to show that this is a combination of factors that is likely to recur.

In briefing this matter to the Ninth Circuit neither party was able to find authority suggesting that there are *any other* petroleum franchise agreements that impose a requirement that PMPA claims be submitted to arbitration. If in fact other petroleum franchisors are including in their franchise agreements arbitration clauses that cover PMPA claims, there is no reason to believe those clauses are similar to the one involved here.

In *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-21 (1985) this Court made it clear that the policy underlying the Federal Arbitration Act, 9 U.S.C. §§ 1-16, is that of enforcing private agreements; it is not based on a Congresssional preference for arbitration as a method of resolving disputes. No violence is done to the policy of the Federal Arbitration Act when an arbitration clause that has been imposed by one party on the other rather than mutually agreed to is held invalid because it contains multiple illegal provisions.

The decision below does not disapprove of arbitration clauses as such. See Petition for Certiorari, Appendix, at A-5. It raises no barriers to including in such clauses waivers of statutory rights if those waivers are the subject of true mutual agreement rather than adhesion. *Id.* It does not prevent the parties from making clear their intention that if certain portions of their arbitration clause, including their voluntary waivers, should be held invalid the rest of the arbitration clause shall remain in force. *Id.* at A-8.

ARCO contends that the provisions which the Ninth Circuit held it was illegal for ARCO to impose on Graham have "real benefits" to franchisees as well as to franchisors. Petition for Certiorari at 9. The Ninth Circuit's decision leaves ARCO free to persuade its franchisees of those benefits. The decision does not prevent ARCO, or any other franchisor subject to the PMPA, from obtaining its franchisees' voluntary agreement to such provisions.

III.

If the Decision Below Does Have Significance Beyond the Facts of This Case, Its Authority Is Limited to Issues Arising Under the Petroleum Marketing Practices Act

ARCO wants this Court to believe that the decision in this case "could invalidate many arbitration clauses in a wide variety of settings." Petition for Certiorari at 7. In fact,

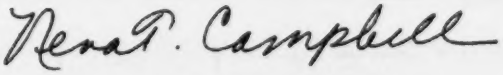
however, the Ninth Circuit's opinion is highly specific to the setting in which the case arose -- disputes subject to the PMPA. That court's initial concern was that the arbitration clause "purports to waive certain statutory rights conferred upon petroleum franchisees by the PMPA." Petition for Certiorari, Appendix, at A-3. The court began its analysis of the validity of the clause by examining the purpose of the PMPA. *Id.* at A-3, A-4. It evaluated the importance of the statutory rights that the clause would eliminate by examining the relationship of those rights to the policies of the PMPA. *Id.* at A-7. In concluding that the entire arbitration clause must be stricken, the court relied heavily on its inconsistency with the purpose of Congress in enacting the PMPA. *Id.* at A-9.

This is not a decision about the right of contracting parties to agree to arbitration of any and all statutory claims. It is a decision about one petroleum franchisor's attempt to deprive its franchisee of rights expressly granted by the Petroleum Marketing Practices Act. The United States Court of Appeals for the Ninth Circuit has correctly held that attempt should not succeed. Review by this Court is not necessary.

CONCLUSION

For all of the reasons discussed above, this case presents no issue appropriate for the Court's review. The Court should deny ARCO's Petition for Writ of Certiorari.

Respectfully submitted,



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